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diligence to obtain that evidence as should sustain a bill of review on the ground of the subsequent procurement of such evidence.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1091, 1094; Dec. Dig. § 447.* 2 Va.-W. Va. Enc. Dig. 393, et seq.]

3. Equity (§ 460*)—Bill of Review—Affidavit—Sufficiency.—Where plaintiff in a suit in equity seeks a review for newly discovered evidence, his verified bill accompanied by the affidavit of the proposed new witness setting forth his testimony, and declaring his willingness to testify, fulfills the requirement that an answer under oath requires at least the testimony of two witnesses, or of one witness and corroborating circumstances to overcome it.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1122; Dec. Dig. § 460.* 2 Va.-W. Va. Enc. Dig. 387.]

Appeal from Corporation Court of City of Roanoke.

Suit by Becker against Johnson. From the decree for defendant, and the decree overruling the motion to file a bill of review, plaintiff appeals. Reversed.

SHOFFNER *v.* SUTHERLAND et al.

Sept. 15, 1910.

[68 S. E. 996.]

1. Appeal and Error (§ 171*)—Questions Reviewable—Theory of Case in Trial Court.—Where a case was tried in the lower court on a theory not presented by the pleadings, the court on appeal will review the case on the same theory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1061; Dec. Dig. § 171.* 1 Va.-W. Va. Enc. Dig. 576.]

2. Waters and Water Courses (§ 75*)—Pollution of Stream—Rights of Riparian Owners.—Any use of a stream that materially fouls the water, or a deposit therein of any filth that so far affects the water as to impair its value for ordinary purposes, or anything which renders the water offensive to taste or smell, or which is calculated to excite disgust in those using it for ordinary purposes, is a nuisance, which equity will enjoin at the suit of a riparian owner injured thereby.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 66; Dec. Dig. § 75.* 13 Va.-W. Va. Enc. Dig. 683.]

3. Waters and Water Courses (§ 75*)—Pollution of Stream—Rights of Riparian Owners.—An operator of a sawmill on a stream threw sawdust into the stream, so that the same was deposited in it and in springs near to it. The deposits discolored the water, and in warm

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

weather the decaying sawdust gave it an offensive odor. Live stock in some instances refused to drink the water, and it was less fit for domestic purposes and was unwholesome. Physicians believed that the decaying sawdust deposits affected the purity of the water, and generally caused disease along the streams where found. Held, that the use of the stream was in violation of the rights of a lower riparian owner, who could sue to restrain such use.

[Ed. Note.—For other cases, see Waters and Water Courses. Cent. Dig. § 66; Dec. Dig. § 75.* 13 Va.-W. Va. Enc. Dig. 683.]

Appeal from Circuit Court, Dickenson County.

Suit by J. E. L. Sutherland and J. M. Powers against J. E. Shoffner. From a decree for plaintiffs, defendant appeals. Affirmed.

BANK OF POCAHONTAS *v.* BROWNING.

Sept. 15, 1910.

[68 S. E. 1000.]

Usury (§ 53*)—Transaction Constituting.—Notes given in satisfaction of a judgment and of claims in another pending suit under an agreement for an extension of time were usurious where they included a sum paid by the creditor as attorney's fees; the transaction not being affected by the fact that the judgment was marked satisfied, and the pending suit dismissed.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 114-118; Dec. Dig. § 53.* 13 Va.-W. Va. Enc. Dig. 440.]

Error to Circuit Court, Tazewell County.

Action by the Bank of Pocahontas against James Browning. From a judgment for defendant, plaintiff brings error. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes